STATE OF MICHIGAN

COURT OF APPEALS

CANTALUPO HOMES & DEVELOPMENT, INC.,

Plaintiff/Counterdefendant-Appellant,

v

GP ENTERPRISES, INC., d/b/a VENUS DAY SPA, NEWBERRY SQUARE, INC., and AMERICAN TOWER DELAWARE CORPORATION,

Defendants/Cross-Defendants-Appellees,

and

LIVONIA BUILDING MATERIALS,

Defendant/Counterplaintiff/Cross-plaintiff/Third-Party Plaintiff-Appellee,

and

LONG MECHANICAL, INC., and INTERCON CORPORATION,

Defendants/Counterplaintiffs/Cross-Plaintiffs/Cross-Defendants-Appellees,

and

WALTER GOLABECK,

Third-party Defendant-Appellee,

and

UNPUBLISHED
September 1, 2005

No. 261327
Oakland Circuit Court
LC No. 01-033851-CH

COLUMN FINANCIAL, INC., CHASE MANHATTAN BANK, as Trustee for COMMERCIAL MORTGAGE PASS, ARBOR DRUGS, INC., and NEW PAR, d/b/a AIR TOUCH CELLULAR,

Defendants/Cross-Defendants,

and

RAY DE STEIGER, INC., d/b/a RAY ELECTRIC,

Defendant/Counterplaintiff/Cross-Plaintiff/Cross-Defendant.

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this action to enforce a construction lien through foreclosure, plaintiff Cantalupo Homes & Development, Inc. appeals as of right the trial court's order granting summary disposition in favor of defendant Newberry Square, Inc. We affirm.

Newberry Square and defendant GP Enterprises, Inc. entered into a long-term lease agreement for the lease of space in a shopping mall owned by Newberry Square. GP Enterprises leased the property for the purpose of operating Venus Day Spa. GP Enterprises secured financing from Michigan National Bank to construct the space to its specifications, then entered into contracts with several contractors, including plaintiff. When GP Enterprises failed to fully pay plaintiff and other contractors, they filed claims of lien against the property. Plaintiff later filed suit against GP Enterprises, Newberry Square, and numerous other parties having lien interests in the property, alleging claims for foreclosure of the construction lien, breach of contract, and unjust enrichment.

The unjust enrichment and breach of contract claims were ordered to arbitration by the trial court, which later entered judgment in favor of plaintiff and other contractors on the arbitration award. Pursuant to the arbitration award, GP Enterprises was required to pay plaintiff the full outstanding amount owed on their contracts. However, after the trial court confirmed and entered judgment on that award, GP Enterprises filed for bankruptcy. The bankruptcy court eventually lifted an automatic stay with respect to the interests of GP Enterprises' shareholders, who then foreclosed on their respective interests and sold the spa's assets to ANJI Holding, Ltd., which thereafter leased GP Enterprises' former space from Newberry Square.

Left without a remedy against GP Enterprises, plaintiff moved to reopen the circuit court case to litigate its claim for foreclosure of its construction lien. After the case was reopened, plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that the lien attached

to Newberry Square's ownership interest in the property, not just the improvements. The trial court, however, rejected plaintiff's argument and granted summary disposition in favor of Newberry Square under MCR 2.116(I)(2). This appeal followed.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Furthermore, statutory interpretation is a question of law, which is reviewed de novo on appeal. *Preserve the Dunes, Inc v Michigan Dep't of Environmental Quality*, 471 Mich 508, 513; 684 NW2d 847 (2004).

The Construction Lien Act, MCL 570.1101 *et seq*., is designed, in relevant part, to establish, protect, and enforce by lien the rights of those performing labor or providing materials or equipment for real property and to provide certain defenses with respect to the use of the lien. See 1980 PA 497. It is a remedial statute that must be "liberally construed to secure the beneficial results, intents, and purposes" of the act. MCL 570.1302.

MCL 570.1107 provides, in pertinent part:

> (1) Each contractor, subcontractor, supplier, or laborer who provides an improvement to the real property shall have a construction lien upon the interest of the *owner or lessee who contracted for the improvement* to the real property, as described in the notice of commencement . . ., the interest of an owner who has subordinated his or her interest to the mortgage for the improvement of the real property, and the interest of an owner who has required the improvement. A construction lien acquired pursuant to this act shall not exceed the amount of the lien claimant's contract less payments made on the contract.
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> (2) A construction lien under the act shall attach to the entire interest of the owner or lessee who contracted for the improvement, including any subsequently acquired legal or equitable interest.
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> (3) Each contractor, subcontractor, supplier, or laborer who provides an improvement to real property to which the person contracting for the improvement had no legal title shall have a construction lien upon the improvement for which the contractor, subcontractor, supplier, or laborer provided labor, material, or equipment. The forfeiture, surrender, or termination of any title or interest held by any owner or lessee who contracted for an improvement to the property or by any owner who subordinated his or her interest to the mortgage for the improvement, or by any owner who has required the improvement shall not defeat the lien of the contractor, subcontractor, supplier, or laborer upon this improvement. [Emphasis added.]

When a statute's language is clear and unambiguous, this Court assumes the Legislature intended its plain meaning, and will enforce the statute as written. *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475, 481; 691 NW2d 50 (2004). Under the plain, unambiguous language of the statute, plaintiff was not entitled to enforce its lien by foreclosure against Newberry Square's ownership interest in the property.

First, Newberry Square did not contract for the improvements. The contracts entered into with plaintiff identified GP Enterprises as the contracting party, and the notice of commencement listed Venus Day Spa as the contracting party.

Second, the lien could not be attached to Newberry Square's interests as an owner who subordinated its interest to the mortgage for the improvement. In August 2000, before the lease was signed, Newberry Square executed a "landlord waiver" for Michigan National Bank. By way of that waiver, however, Newberry Square, as owner of the realty, did not subordinate its interest in the realty to the mortgage for the improvements. Rather, it subordinated any interest in the collateral used to secure the loan. The collateral was the personal property of GP Enterprises that was or would be attached as fixtures or otherwise to the realty. At the time the waiver was signed, Newberry Square had no interest in the "collateral." Moreover, while the "landlord waiver" indicates that it was signed to induce the bank to provide a loan, the signing of the "landlord waiver" appears to have been a perfunctory requirement by the bank to ensure that there would be no dispute at a later time regarding who had first priority in the collateral where the entity seeking the loan did not own the realty. The record does not factually support that Newberry Square subordinated its interest in the realty to the loan for the improvements.

Third, the lien could not attach to Newberry Square's interest in the realty on the ground that Newberry Square was an owner who required the improvement. The lease gave GP Enterprises the right and privilege to, at its own risk, install trade fixtures on the premises. The lease contemplated that GP Enterprises would obtain its own financing and make any improvements it needed for its business. The lease also required GP Enterprises, at the expiration of the lease, to remove trade fixtures and furniture. We reject plaintiff's argument that the express language of the lease required GP Enterprises to make any particular improvements. Although the form provisions of the lease required Newberry Square to make some improvements to the leased premises, a rider to the lease, which was signed on the same day as the lease, provided that GP Enterprises was accepting the premises in an "as is" condition. Therefore, the lease did not require Newberry Square, as the landlord, to make any improvements before GP Enterprises took the property. See *Smart v New Hampshire Ins Co*, 148 Mich App 724, 734; 384 NW2d 772 (1985) ("endorsements or riders prevail over form provisions of a contract"); see also *Morbark Industries, Inc v Western Employers Ins Co*, 170 Mich App 603, 613; 429 NW2d 213 (1988), and *Royce v Citizens Ins Co*, 219 Mich App 537, 544; 557 NW2d 144 (1996). The lease did not obligate GP Enterprises to make the improvements that were listed as the landlord's responsibility in the form provisions of the contract. GP Enterprises was free to choose the improvements it wanted or needed to run its day spa. Consequently, under the plain, unambiguous language of the statute, plaintiff was not entitled to enforce its lien by foreclosure against Newberry Square's ownership interest in the property.

However, while the plain language of MCL 570.1107 does not permit plaintiff's lien to attach to Newberry Square's interests in its realty, there is an exception in the law that may enable a contractor to attach its lien to the landlord's interests where the tenant contracts for the improvements. In *Rowen & Blair Electric Co v Flushing Operating Corp*, 399 Mich 593, 600; 250 NW2d 481 (1977), our Supreme Court held that a lien may attach to an owner's interest if the tenant acted as the agent of the landlord in contracting for improvements. Plaintiff argues

that GP Enterprises was Newberry Square's agent when contracting for improvements. We disagree.

The existence and scope of an agency relationship is a question of fact for the trier of fact. *Norcross Co v Turner-Fisher Assoc*, 165 Mich App 170, 181; 418 NW2d 418 (1987). "An implied agency must 'rest upon acts and conduct of the alleged agent known to and acquiesced in by the alleged principal prior to the incident at bar.'" *Id*., quoting *Shinabarger v Phillips*, 370 Mich 135, 139; 121 NW2d 693 (1963). But the mere relationship of landlord and tenant does not create an agency relationship. *Rowen, supra* at 601. Each case must be decided on its own facts with the primary focus being whether the lessee was or should be viewed as an agent for purposes of contracting for improvements. *Id*. In *Rowen, supra* at 601-602, the Court noted that an agency relationship may be found where the lessee is required to make improvements or the lessor is required to pay for the improvements, but that if improvements are merely permitted, "it has been held that there is no agency even when the lessee is granted reduced rents if he chooses to make improvements." See also *J & I Service Station, Inc v Wash Wagon of MI, Inc*, 120 Mich App 533, 537; 327 NW2d 518 (1982) (because the lien statute "is based on contractual relationships, a landlord who permits but does not require improvements has not created a principal-agent relationship with the tenant").

In *Norcross, supra* at 180-182, this Court concluded that an agency relationship existed and that the construction lien could attach to the owner's interest where another entity contracted for the improvements. However, that case did not involve a landlord/tenant situation. Rather, the defendant property owner acted as a developer and contracted with an investment company to make alterations, renovations, and improvements that would later be sold or leased to others. *Id*. at 173. The agency relationship was established because the defendant property owner acquiesced in and approved of the improvements, required the improvements to be performed under supervision of an architect, and filed an acknowledgement with respect to improvements already made and future improvements to be made for the purpose of assisting the investment company in leasing part of the property. *Id*. at 175-176, 180-182.

In this case, there was no question of material fact with respect to the existence of an agency relationship between Newberry Square and GP Enterprises. Newberry Square did not finance, approve, have input into, or require any of the improvements contracted for by GP Enterprises. It merely permitted the improvements to be made by GP Enterprises to enable it to run its business. There was no joint venture between Newberry Square and GP Enterprises. Neither Newberry Square nor GP Enterprises misrepresented their relationship to plaintiff, and plaintiff did not rely on Newberry Square's credit when entering into contracts with GP Enterprises. Plaintiff contracted with GP Enterprises alone. Further, there was no evidence that Newberry Square anticipated that any of the improvements made by GP Enterprises would be of benefit to it after the lease expired. In fact, the lease contemplated that GP Enterprises would remove its trade fixtures. Trade fixtures are defined as those fixtures annexed to leased realty for the purpose of enabling the lessee to engage in a particular business. *Wentworth v Process Installations, Inc*, 122 Mich App 452, 465; 333 NW2d 78 (1983). The improvements were to benefit GP Enterprises in running its business from the leased premises. The fact that Newberry Square discounted plaintiff's rent for the first year does not change the outcome. See *Rowen, supra* at 602. Moreover, the "landlord waiver" was executed to establish priority in the lender over the collateral, i.e., GP Enterprises' personal property. The waiver did not create an agency

relationship between GP Enterprises and Newberry Square and, by way of that waiver, Newberry Square did not affirmatively seek to assist GP Enterprises in financing the improvements.

In arguing that its lien should attach to Newberry Square's ownership interest in the property and not just to the improvements, plaintiff also asserts that the improvements became part of Newberry Square's ownership interest when GP Enterprises forfeited or surrendered them. We agree that, on the record before us, the bulk of improvements made by plaintiff to the leased premises were forfeited or surrendered to Newberry Square when GP Enterprises broke its lease. Contrary to Newberry Square's position, all of the improvements were not sold to ANJI Holding, Ltd. ANJI Holding, Ltd. did not purchase the ceiling, interior walls, interior doors, door hardware, lavatory, air conditioner or other items set forth in the affidavit filed by plaintiff's president. Rather, it acquired use of those improvements through its subsequent lease with Newberry Square.

However, regardless of the fact that Newberry Square owns the bulk of the improvements made by plaintiff, there is no authority to support that an agency relationship can be established solely because a landlord ultimately benefited from improvements that were forfeited, surrendered, or abandoned to the landlord. Further, no authority supports that where improvements become part of a landlord's ownership interest through forfeiture or surrender, an existing lien may be extended to and enforced against the owner's property interest. MCL 570.1107(3) provides that forfeiture, surrender, or termination of the lessee's interest in the improvement shall not defeat the lien of the contractor upon the *improvement*. This Court assumes the Legislature intended the plain meaning of MCL 570.1107(3), and will enforce that language as written. *Krug*, *supra*. Pursuant to that statutory provision, the lien remained with the improvements.[1] MCL 570.1107(3). Moreover, we note that the improvements that were forfeited to Newberry Square were beneficial to Newberry Square only because it entered into a lease with ANJI Holding, Ltd., after ANJI Holding, Ltd. purchased the spa's assets. If ANJI Holding, Ltd. had not entered into a lease with Newberry Square, taking the property "as is," Newberry Square may not have realized any benefit from the improvements made. The design and construction of those improvements would not necessarily benefit the next business taking over the leased space. Indeed, a new tenant may have had different requirements for placement of walls, ceilings, interior doors, lavatories, placement of electrical outlets, etc. The trial court properly granted summary disposition to Newberry Square and refused to permit plaintiff to foreclose on its lien against Newberry Square's ownership interest in its property.[2]

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[1] Plaintiff makes a cursory, alternate argument that it is entitled, at the very least, to a lien on the improvements under MCL 570.1107(3). However, in its statement of the questions presented, plaintiff raises only the issue whether it should be entitled to foreclose on a lien against Newberry Square's ownership interest in the real property. Consequently, any issue with respect to a continuing lien in the improvements is not properly before this Court. *Weiss v Hodge*, 223 Mich App 620, 634; 567 NW2d 468 (1997).

[2] Plaintiff additionally argues that its failure to plead an agency theory in its complaint should not, by itself, entitle Newberry Square to summary disposition. We need not address this issue in light of our holding that there was no question of material fact on the agency issue.

Plaintiff also asserts that the "trade fixtures doctrine" has no application to this case. In doing so, however, plaintiff fails in its cursory argument to explain or rationalize its position to this Court. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis of that position, nor may it give only cursory treatment to a position. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). Briefly, however, we note that the trade fixtures doctrine permits a lessee, upon termination of a lease, to remove fixtures from the lessor's real property. See *Outdoor Systems Advertising, Inc v Korth*, 238 Mich App 664, 667-668; 607 NW2d 729 (1999). In this case, removal of fixtures by a lessee from the lessor's real property was not an issue. More importantly, the trial court did not grant relief based on the "trade fixtures doctrine." While it noted that the improvements at issue were trade fixtures and belonged to GP Enterprises, it decided plaintiff's claim for foreclosure through the rules articulated in *Rowen*, *supra*, and its progeny.

Plaintiff further argues that, in order to survive summary disposition, Newberry Square was required to demonstrate that the improvements made by it were sold to ANJI Holding, Ltd. and did not revert back to Newberry Square. This argument, however, is again undeveloped and we consider it abandoned. *Miller v Allied Signal, Inc*, 235 Mich App 710, 716; 599 NW2d 110 (1999) (where a party fails to properly raise an issue, review is inappropriate); *Houghton*, *supra* at 340. Specifically, plaintiff does not explain or rationalize how the forfeiture or surrender of the improvements to Newberry Square changes the outcome of this case. As previously discussed, plaintiff has not cited any authority to support that where improvements contracted for by a tenant are forfeited or abandoned to the landlord, the construction lien may then attach to the realty and not just the improvements. To the contrary, MCL 570.1107(3) provides only that forfeiture, surrender, or termination of a lessee's interests does not extinguish the lien in the improvement.

Finally, we note that plaintiff argues issues related to its unjust enrichment claim. However, plaintiff failed to raise an issue with respect to that claim in its statement of the questions presented. Consequently, we decline to address any issue related to the unjust enrichment claim. *Weiss*, *supra*.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey